

A TIME TO LOSE

REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION

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For

Harriet and our children, who believe I was on the wrong side.

May this book mitigate their decades of embarrassment.

6 A time to get, and a time to lose; a time to keep, and a time to cast away;

7 A time to rend, and a time to sew; a time to keep silence, and a time to speak;

8 A time to love, and a time to hate; a time of war, and a time of peace.

Ecclesiastes 3:6-8

King James Version (KJV)

INTRODUCTION – PAGE 1

This is the story of a lawsuit and of a country lawyer's unsought, unplanned, and unearned brush with history. The story reached its climax at high noon on Monday, May 17, 1954, in the Supreme Court Chambers in Washington, D.C. On that occasion the Court opened its session by announcing its decision in *Brown v. Board of Education of Topeka* et al. As an obscure assistant attorney general of the state of Kansas I have a not very important role in the *Brown* case. I was one of the losers. What follows is in the nature of a memoir. After four decades I am attempting to recall and to record what I observed, what I thought, what I felt, what I did, and what I said during the preparation for and presentation of the argument.

My caveat is this: the facts that I report are based largely upon my memory. I did not keep a diary. More than forty years have passed since I first stood before the Supreme Court to speak about *Brown v. Board of Education*. During that time the sun has risen more than 15,000 times, and I have become an old man. The memories of old men are sometimes tinged with romance. They remember things not as they were, but as they might have been or ought to have been. Here, I appear as a witness, testifying as to things that happened a long time ago. I am mindful of the witness's obligation to tell the truth, the whole truth and nothing but the truth. But I am also an old man.

ON BEING RIGHT ON THE WRONG SIDE – PAGE 100

As I read the relevant contemporary literature, it became apparent that the state's argument in support of its law would rest on judicial precedent and the history, traditions, and customs of Kansans. With few exceptions, the more articulate scholars who wrote in the fields of education and the behavioral sciences were against us. At the same time, to me it was clear that the state's position was supported by existing law. The doctrine of separate but equal still controlled; only by making new law could the Supreme Court sustain the contentions of Linda Brown and her friends. In my heart I found no objection to the change sought. If I had been a Kansas legislator or a member of the Topeka Board of Education, I should have been pleased to vote to repeal segregation statute and repudiate the public school policy that it permitted. But I was not a legislator, nor was I an individual seeking to implement my personal moral standards. I was a lawyer committed to uphold the law and the adversary process. The appellants were represented by able counsel prepared to attack wherever they sensed

vulnerability. As I saw it, the task of counsel for the state was to rebut that effort by bringing to the Court's attention all data and theories favorable to the state's position. Justice Oliver Wendell Holmes is reported to have said that the job of the judge is not to do justice but to play the game according to the rules. The lawyer's task is to inform the court as to what his client believes the rules to be. Whatever the outcome, the lawyer who has been faithful to his responsibility will have made a useful contribution to the result.

The hostility of scholars to Kansas's position was compounded by the indifference of my professional colleagues. Most Kansas lawyers were uninterested in the problems of the Topeka Board of Education and its black constituents. My pursuit was a lonely one.

AUTUMN-THE SEASON OF OUR DISCONTENT – PAGE 109

Others, including numerous strangers to the litigation, did not share the Kansas reluctance to be heard. In each of the three cases in which appeals were pending, the appellant's briefs and supporting documents were filed in due time. Responses by the appellees were given high priority except in Kansas. Around mid-summer we began to receive requests from organizations seeking to file only briefs *amicus curiae*. Such briefs by nonparties could be filed only with the consent of the parties or when ordered by the court. I always responded affirmatively to such requests, feeling that the court should have the benefit of the thinking of anyone with serious views on the issues. Eventually *amicus curiae* briefs were filed on behalf of the American Jewish Congress, the American Civil Liberties Union, the American Federation of Teachers, the Japanese-American Citizens League, the American Ethical Union, the Unitarian Fellowship of Social Justice, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith, the American Veterans' Committee, and the Congress of Industrial Organizations. All were filed with consent given by me on behalf of the state of Kansas. I later learned that the consent of the attorneys in the South Carolina and Virginia cases had been denied, and the *amicus* briefs were filed in the Kansas case only. My acquiescence had been critical. Without it the Supreme Court record would not have reflected the views of these organizations. The term "*amicus curiae*" means "friend of the court." As it turned out none were friends of Kansas and the Topeka Board of Education.

THE BUCK STOPS WHERE? – PAGE 112

None was more troubled by the uncertainty and indecision of the board than Attorney General Dick Fatzer. Dick had often stated that racial segregation in the public schools of any Kansas community was morally, politically, and economically indefensible. As attorney general he had sought successfully to gain the support of the black community. Black leaders were his friends. From the beginning he had emphasized that he did not intervene in *Brown* to defend the racial policies of the Topeka Board of Education. He appeared only to defend the validity of a Kansas statute that was constitutional under all of the law that we then knew or could know. As days and weeks and months dragged on, he must have rued his eleventh-hour decision to intervene in the district court case. The attorney general had no statutory duty to appear, nor had he been ordered to do so by the governor, either branch of the legislature, or the court. At the trial the attorneys for the state had been passive participants. Looming large among the reasons that the attorney general was in the case was the urging of members of the board of education and their friends. The prospect of the board's abandoning the case, casting upon the state the entire burden of defending the appeal was, to say the least, displeasing.

Politics, too, was among the attorney general's concerns. Dick Fatzer had been the state's chief prosecutor for three years. In the performance of his duties he had been impartial, aggressive, and vigorous and had sometimes trodden on sensitive toes. He was aware that his policies had provoked controversy. In November 1952 he would face an opponent who was known as a competent lawyer and whose campaign was being well managed and financed. Although the black vote in the election would not exceed 5 percent of the total, Dick was reluctant to take a position that might alienate the black voters who had supported his past candidacies. Moreover, we who knew him were aware that Dick's political ambition looked beyond 1952. His predecessor, Ed Arn, had become governor. History, if given the opportunity, might repeat itself.

IT'S NOT OVER TILL IT'S OVER – PAGE 119

Among other noteworthy events of that day before Thanksgiving was a call from Mr. Moore, of Richmond. The gist of his message was a proffer of assistance. He said that two of the young lawyers in his firm who had worked on the Virginia brief were willing to fly to Topeka immediately to assist me in briefing the Kansas defense. The offer was indeed tempting. There were only twelve days remaining before the case was to be called for argument. If I took into account the time that

would be required for printing and mailing copies to our adversaries, I saw only a week available for necessary further research and for planning and writing the appellees' brief. I had learned that Mr. Moore's law firm was regarded as one of Virginia's finest, and I was certain that its members were competent lawyers. They had just gone through the process that I was commencing. I declined their offer with thanks because I did not think it appropriate for Kansas to rely on or to be too closely associated with Virginia and its counsel. The Virginians were segregationists. They were defending a statewide policy that mandated segregated schools. Before the Supreme Court, Virginia's attorney general argued that desegregation would destroy the public schools of the state. In less august environments some of his fellow Virginian's asserted that blood would flow in the streets of Richmond before black children would attend school with whites. Kansas had no sympathy for such views. Aware of my own limitations and troubled by the dimensions of the task, I thought it better to go it alone.

IT'S NOT OVER TILL IT'S OVER – PAGE 125

Several days passed while our entire effort and attention was directed at the completion of the brief. When I had read and approved the last galleys and the presses had been set in motion, I reported to General Fatzer. He wanted to talk to me about the case. He had decided that Kansas should be represented at the arguments before the Supreme Court. He then pointed out that the Wyandotte County Grand Jury was still in session and that residents of Kansas City were petitioning him to bring ouster proceedings against the mayor. Moreover, at the end of the week of December 8 the National Association of State Attorneys General would hold its annual meeting at Sea Island, Georgia, and General Fatzer expected to be elected president of the organization, an honor that he wanted to receive in person. He would not be able to go to Washington for the argument. Although other assistants in the office were senior to me, one was ill, and none was as familiar with the case as I. Coming to the point, he said, "I want you to go back there and do what you can with the damn thing." He was talking to me. It was Thursday, December 4. The case was set for argument on December 8.

ARGUMENT – PAGE 151

At 3:15 P.M. the chief justice called "Case No. 101, Harry Briggs, Jr., et al. against Roger W. Elliott, chairman, J.D. Carson, et al., member of Board of

Trustees of School District No. 22, Clarendon County, South Carolina, et al.” As John W. Davis moved into the chair that I had vacated, Thurgood Marshall approached the lectern and began to speak. The main event was under way. A dispassionate analyst would find little in the speeches that was new and different. The ideas were ones that I had heard, read, or thought of before, but the force and eloquence with which they were expressed gave them new vigor and meaning. The contrasting personalities of the adversaries added drama to the debate. Each seemed to be an eminently suitable protagonist of the view that he urged. Mr. Davis, the near octogenarian, was a patrician. His voice was mellow yet strong, his sentences clear and complete, his diction exquisite. The justices listened to his argument with almost deferential respect. Only twice was he interrupted by questions from the bench. He spoke to support an understanding of the Constitution that he believed was rational and just and consistent with traditional American values. His challenger, Thurgood Marshall, was, at forty-five, in the prime years of a brilliant career in advocacy. The descendant of slaves and the son of a country club steward, he was the product of Baltimore’s segregated public school system and of the law school at Washington’s then all-Negro Howard University. It is part of the Marshall folklore that as a law student he regularly cut classes to attend Supreme Court sessions whenever John W. Davis was appearing there. He was more laid-back than dignified, his speech was more forceful than elegant, and he was more concerned with issues of social justice than with history and precedent. He thought America could do better.